

**Before the
Federal Communications Commission
Washington, DC 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Implementation of) MM Docket No. 99-339
Video Description of)
Video Programming)
)

**COMMENTS OF THE
THE NATIONAL ASSOCIATION OF BROADCASTERS**

NATIONAL ASSOCIATION OF
BROADCASTERS
1771 N Street, NW
Washington, DC 20036
(202) 429-5430

Henry L. Baumann
Jack N. Goodman
Jerianne Timmerman

Arthur W. Allison III
Kelly T. Williams
NAB Science and Technology

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Executive Summary

The National Association of Broadcasters (“NAB”) submits these comments in response to the *Notice of Proposed Rulemaking* seeking comment on proposals for the introduction of video description in the programming of major market television broadcasters and the larger multichannel video programming distributors. Although NAB supports voluntary efforts to make television programming more accessible to persons with visual disabilities, we believe that the Commission’s proposals mandating the provision of described programming in an analog environment should not be adopted.

Most fundamentally, the Commission lacks the statutory authority to prescribe rules requiring the provision of video description services. An examination of the language, legislative history and structure of Section 713 of the Communications Act shows that the Commission has only the authority to conduct an inquiry and issue a report on the use of video description. Moreover, given the specific provisions of Section 713 explicitly addressing video description, the Commission cannot rely on other general provisions of the Communications Act to authorize issuance of mandatory rules. NAB also believes that the Commission’s proposal to mandate the provision of described programming raises the constitutional problem of forced speech.

Beyond these statutory and constitutional difficulties with mandatory video description rules, NAB identifies sound policy reasons militating against the adoption of such rules, particularly in the analog environment. Specifically, NAB asserts that the Commission has underestimated the technical difficulties and the costs for networks and affiliated stations associated with providing described video programming in an analog environment. NAB also points out that, to the extent that video description requirements

are adopted in an analog environment, other important uses (such as foreign language audio) of the Secondary Audio Programming channel will be foreclosed. Given the limitations of analog technology and the current transition to digital broadcasting, NAB suggests that the Commission would be better advised to focus now on insuring that the digital equipment currently being developed will fully accommodate video description. This approach would also avoid requiring broadcasters to upgrade extensively their analog distribution systems at a time when they are scheduled to be abandoned. The Commission should not mandate such “orphan” investments, as would be required to implement video description with analog technology.

In addition to the technical challenges associated with providing described programming in the analog environment, NAB explains that mandating the provision of video description -- whether in an analog or digital environment -- presents other legal and practical complexities. In particular, the Commission has underestimated the extent to which mandated video description requirements will raise copyright questions and necessitate significant changes to the entire network program production process. NAB also believes that, prior to the adoption of any video description requirements in either an analog or digital environment, the Commission must realistically assess the relative costs and benefits of its proposed rules.

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The National Association of Broadcasters (“NAB”)¹ submits these comments in response to the Commission’s *Notice of Proposed Rulemaking* in this proceeding.² The *Notice* sought comment on proposals for the introduction of video description in the programming of major market television broadcasters and the larger multichannel video programming distributors. Although NAB supports voluntary efforts to make television programming more accessible to persons with visual disabilities, we question the statutory authority of the Commission to adopt mandatory video description requirements and note the constitutional implications of doing so. Sound policy reasons also militate against the adoption of mandatory video description rules, particularly in the analog environment. Specifically, NAB believes that the Commission has underestimated the technical difficulties and the financial and other costs associated with providing described programming in an analog environment. Moreover, mandating the

¹ NAB is a nonprofit, incorporated association of television and radio stations and broadcast networks which serves and represents the American broadcast industry.

² *Notice of Proposed Rulemaking* in MM Docket No. 99-339, FCC 99-353 (rel. Nov. 18, 1999) (“*Notice*”).

provision of described programming – whether in an analog or digital environment – raises other legal and practical complexities, especially in the program production process. In light of these significant legal, technical and other difficulties presented by the Commission’s proposal to mandate the provision of video description services, NAB urges the Commission to refrain from imposing its proposed mandatory video description rules, particularly during the current period of transition from analog to digital broadcasting.

I. THE COMMISSION LACKS STATUTORY AUTHORITY TO PRESCRIBE RULES REQUIRING THE PROVISION OF VIDEO DESCRIPTION SERVICES.

Section 305 of the Telecommunications Act of 1996 (“1996 Act”) added a new Section 713, Video Programming Accessibility, to the Communications Act of 1934 (“Communications Act”). 47 U.S.C. § 613. This new Section 713 specifically addresses both the closed captioning and video description of television programming. An examination of this section’s text, legislative history and structure shows that the Commission lacks the statutory authority to adopt rules mandating the provision of video description services. Moreover, no other general statutory provision affords the Commission the authority to mandate such services, given the specific terms of Section 713. The constitutional implications of prescribing video description requirements also militate against an overly broad reading of the Commission’s authority with respect to video description.

A. The Language of Section 713(f) Only Authorizes the Commission to Conduct an Inquiry and Report to Congress on Video Description.

Section 713(f), entitled “Video Descriptions Inquiry,” directs the Commission to “commence an inquiry to examine the use of video descriptions” and “report to Congress on its

findings.”³ The Commission did in fact report to Congress, as it had been directed, and Congress has not seen fit to take any further action.⁴ Because Congress has spoken directly to the issue of video description and has only authorized the Commission to conduct a study and report on its findings, the Commission lacks statutory authority under Section 713(f) to prescribe rules requiring programming distributors to provide video description services.

As explained by the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), an agency (and a reviewing court) “must give effect to the unambiguously expressed intent of Congress.” If, “employing traditional tools of statutory construction,” it is determined that Congress “had an intention on the precise question at issue,” that “is the end of the matter” because Congress’ “intention is the law and must be given effect.”⁵

“The first traditional tool of statutory construction focuses on the language of the statute.”⁶ As the Supreme Court has repeatedly emphasized, there is one “cardinal canon” in interpreting a statute – a presumption “that a legislature says in a statute what it means and means in a statute what it says there.” *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-54 (1992). In Section 713(f), Congress clearly addressed the issue of video description, and

³ 47 U.S.C. § 613(f). This section also states that the “Commission’s report shall assess” various technical, quality and legal standards and issues relating to video description.

⁴ See *Report* in MM Docket No. 95-176, 11 FCC Rcd 19214 (1996).

⁵ *Chevron*, 467 U.S. at 843 and note 9. The “traditional tools of statutory construction” used to ascertain congressional intent include “examination of the statute’s text, legislative history, and structure, as well as its purpose.” *Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044, 1047 (D.C. Cir. 1997) (applying *Chevron* in a case challenging the Commission’s construction of a provision of the 1996 Act) (internal citations omitted).

⁶ *Bell Atlantic*, 131 F.3d at 1047. See also *Bailey v. U.S.*, 516 U.S. 137, 144 (1995) (in interpreting a statute, court must start with the language of the statute).

explicitly directed the Commission to “commence an inquiry” and “report to Congress” on the use of video description. The Commission therefore “must presume” that its authority with regard to video description is limited to conducting a study and preparing a report, as Congress said, and does not extend to the adoption of mandatory rules. *Germain*, 503 U.S. at 253. Moreover, because Congress “has directly spoken to the precise question” of video description by adopting Section 713(f),⁷ and the express terms of that section only authorize the Commission to conduct a study and issue a report, any effort by the Commission to construe Section 713(f) as authorizing the adoption of mandatory rules would not merit judicial deference. *See Chevron*, 467 U.S. at 843 (an agency’s construction of a statute entitled to deference by reviewing court only if a statute “is silent or ambiguous with respect to the specific issue”).⁸

B. The Legislative History of Section 713(f) Also Shows that Congress Did Not Intend the Commission to Prescribe Mandatory Video Description Rules.

Beyond focusing on the language of the statute itself, examining legislative history is one of the traditional tools of statutory construction used to determine congressional intent under *Chevron*. *See Bell Atlantic*, 131 F.3d at 1047. An examination of the legislative history of Section 713(f) shows that Congress did not intend for the Commission to conduct a rulemaking with respect to video description.

As set forth in the Conference Report to the 1996 Act, the original Senate bill merely required the Commission to undertake a feasibility study regarding the use of video description, while the more detailed House provision directed the Commission to initiate an inquiry regarding the use of video description and to report to Congress on its findings. In addition, the House

⁷ *Chevron*, 467 U.S. at 842.

⁸ *Accord Bell Atlantic*, 131 F.3d at 1047 (if Congress has expressed its intention as to a question, then judicial deference to an agency’s interpretation of a statute is “not appropriate”).

version provided that, following the completion of its inquiry, the Commission “may adopt regulations it deems necessary to promote the accessibility of video programming to persons with visual impairments.”⁹ In the Conference Committee, it was agreed to adopt the House provision with modifications as the new Section 713. Significantly, as noted by the Conference Report, the agreement deleted the House provision referencing a Commission rulemaking with respect to video description. *See* Conference Report at 184.

This removal by the Conference Committee of language specifically authorizing a video description rulemaking clearly shows that Congress did not intend for the Commission to adopt regulations mandating the provision of video description services. Next to the language of “the statute itself,” a conference report is regarded as “the most persuasive evidence of congressional intent” because it “represents the final statement of terms agreed to by both houses.” *Demby v. Schweiker*, 671 F.2d 507, 510 (D.C. Cir. 1981).¹⁰ In the case of Section 713(f), “the final statement of terms agreed to by both houses” expressly *excluded* any reference to a Commission rulemaking on video description. Moreover, as the Supreme Court has specifically recognized, the deletion of a provision from a bill in conference committee “strongly militates against a judgment that Congress intended a result that it expressly declined to enact.” *Gulf Oil Corporation v. Copp Paving Co., Inc.*, 419 U.S. 186, 200 (1974). Because Congress in the Conference Committee to the 1996 Act “expressly declined to enact” a provision in Section 713(f) authorizing the adoption of regulations with regard to video description, it is impossible to

⁹ H.R. Rep. No. 458, 104th Cong., 2d Sess. 183 (1996) (“Conference Report”).

¹⁰ *Accord Northwest Forest Resource Council v. Glickman*, 82 F.3d 825, 835 (9th Cir. 1996); *Resolution Trust Corporation v. Gallagher*, 10 F.3d 416, 421 (7th Cir. 1993); *Davis v. Lukhard*, 788 F.2d 973, 981 (4th Cir.), *cert. denied*, 479 U.S. 868 (1986); *Sierra Club v. Clark*, 755 F.2d 608, 615-16 (8th Cir. 1985).

contend that Congress intended the Commission to adopt rules mandating the provision of video description services. *Id.*

C. A Comparison of Section 713(f) on Video Description to Other Sections on Closed Captioning Shows that Congress Intended Disparate Treatment.

A comparison of Section 713(f) addressing video description with Sections 713(a)-(e) dealing with closed captioning shows that Congress intended the Commission to adopt rules requiring the implementation of closed captioning only. Specifically, as discussed in detail above, Congress directed the Commission in Section 713(f) only to commence an inquiry to examine the use of video description and report to Congress. Conversely, in Sections 713(a)-(e) addressing closed captioning, Congress directed the Commission to not only conduct an inquiry and submit a report to Congress, but also to “prescribe such regulations as are necessary” to “ensure” that video programming is accessible “through the provision of closed captions.”¹¹

Given that Congress in the 1996 Act specifically directed the Commission to prescribe regulations for the implementation of closed captioning, the absence of any language referring to a rulemaking with regard to video description appears particularly significant. As the courts have frequently stated, where “Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion.”¹² Thus, it must be

¹¹ 47 U.S.C. §§ 613(a)-(b). Congress also specifically directed the Commission to establish an appropriate schedule of deadlines for the provision of closed captioning, and authorized the Commission to permit certain exemptions from the closed captioning requirements. *See* 47 U.S.C. §§ 613(c)-(e).

¹² *Gozlon-Peretz v. U.S.*, 498 U.S. 395, 404 (1991); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987); *Russello v. U.S.*, 464 U.S. 16, 23 (1983); *Independent Bankers Association of America v. Farm Credit Administration*, 164 F.3d 661, 667 (D.C. Cir. 1999); *Goncalves v. Reno*, 144 F.3d 110, 129 (1st Cir. 1998), *cert. denied*, 119 S.Ct. 1140 (1999).

presumed that Congress acted “intentionally and purposefully” in excluding language from the 1996 Act authorizing a Commission rulemaking with regard to video description, while including such language with respect to closed captioning. Moreover, such a “contrast in statutory language is ‘particularly telling’ when it represents a decision by a conference committee to resolve a dispute in two versions of a bill.” *Goncalves*, 144 F.3d at 132, *citing*, *FEC v. NRA Political Victory Fund*, 513 U.S. 88, 95 (1994). Because (as discussed above) this contrast in the closed captioning and video description provisions of Section 713 did ultimately result from a conference committee decision resolving differences between the Senate and House versions of that new section, Congress’ intent to authorize a Commission rulemaking with regard to closed captioning, but not with respect to video description, is plainly evident.

D. Other General Provisions of the Communications Act Do Not Authorize the Commission to Prescribe Video Description Rules.

As discussed in detail above, an examination of the language, legislative history and structure of Section 713 demonstrates that the Commission lacks the statutory authority to adopt rules mandating the provision of video description services. Although Section 713(f) is the *only* provision of the Communications Act cited in the *Notice* that specifically addresses video description, the Commission identified numerous other, general statutory provisions as providing authority to adopt the proposed video description rules.¹³ NAB disagrees with this position.

“It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged” by another “statute covering a more generalized

¹³ For instance, the *Notice* cited Sections 1, 2(a) and 4(i) of the Communications Act, which generally define the Commission’s purpose, jurisdiction and powers. The Commission also relied upon several sections of the Communications Act (such as 303(r), 309(a), 307(c)(1) and 310(d)) that include the “public interest, convenience and necessity” standard in various contexts. The Commission further noted a general congressional preference for the increased

spectrum,” regardless of the priority of enactment. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976). Because Section 713(f) deals solely with the “narrow, precise, and specific subject” of video description, its terms cannot be “controlled or nullified” by other, more general grants of authority to the Commission.¹⁴ Indeed, Section 713(f) -- with its language limiting the Commission’s authority to commencing an inquiry and reporting to Congress -- must be regarded as governing the Commission’s authority with regard to the subject of video description. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992) (in holding that a general “remedies saving” clause could not be allowed to supersede a specific substantive preemption provision, court stated that it was “a commonplace of statutory construction that the specific governs the general”).¹⁵

In particular, the Commission cannot rely upon its general grants of authority (such as in Sections 2(a) and 4(i) of the Communications Act) to expand the limitations contained in Section 713(f), which specifically addresses the subject of video description. *See Halverson v. Slater*,

accessibility of certain communications services for persons with disabilities, and cites several provisions concerning telecommunications services and equipment. *See Notice* at ¶¶ 35-37.

¹⁴ *See Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) (“a specific statute will not be controlled or nullified by a general one”); *Uncompahgre Valley Water Users Ass’n v. FERC*, 785 F.2d 269, 276 (10th Cir.) (“more specific legislation covering the given subject-matter will take precedence ‘over the general language of the same or another statute which might otherwise prove controlling’”) (*quoting Kepner v. U.S.*, 195 U.S. 100, 125 (1904)), *cert. denied*, 479 U.S. 829 (1986).

¹⁵ *See also Preiser v. Rodriguez*, 411 U.S. 475, 489-90 (1973) (specific habeas corpus statute held to override the general terms of civil rights statute); *Landmark Land Co., Inc. v. OTS*, 948 F.2d 910, 912 (5th Cir. 1991) (a specific statutory provision dealing with a narrow category of administrative supervision of bankrupt savings banks was held to “trump” a provision concerning bankruptcy proceedings in general); *South African Airways v. Dole*, 817 F.2d 119, 126 (D.C. Cir.) (specific congressional directive regarding air service was found to supersede Secretary of Transportation’s general duties under Aviation Act), *cert. denied*, 484 U.S. 896 (1987); *In re Thornhill Way I*, 636 F.2d 1151, 1156 (7th Cir. 1980) (where there were two arguably applicable provisions in Bankruptcy Act, one of which was general and the other was particular, the particular provision “must prevail”).

129 F.3d 180, 181-86 (D.C. Cir. 1997) (general statute authorizing Secretary of Transportation to delegate certain powers and duties to any Transportation officer or employee could not be “construed to expand” a more specific statute’s limitation of that delegation authority). Because the only statutory provision in the Communications Act addressing video description limits the Commission’s authority to conducting an inquiry and reporting to Congress, other, very general provisions that do not even refer to video description cannot be interpreted as providing separate authority to adopt mandatory rules with regard to video description. *See Crawford Fitting Company v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987) (in case concerning the award of expert witness fees to a prevailing litigant, court held that a specific statutory provision relating to witness fees controlled over a general provision concerning the award of litigation costs, which did not refer “explicitly” to witness fees).¹⁶

In Section 713(f), Congress directly spoke “to the precise question” of video description. *Chevron*, 467 U.S. at 842. By examining that section utilizing “the traditional tools of statutory construction,” the intent of Congress to authorize only a study and report on video description becomes clear. *Id.* at 843. Because the Communications Act, as amended by the 1996 Act, is neither “silent” nor “ambiguous” with respect to video description, the Commission must give effect to the intent of Congress, as unambiguously expressed in Section 713(f). *Id.* As the language, legislative history and structure of Section 713 demonstrate, the Commission’s

¹⁶ After all, if the general provisions of the Communications Act enacted decades earlier could be construed to provide authority for the adoption of video description regulations, why then did Congress believe it necessary to adopt in 1996 a statutory provision explicitly addressing video description? The Commission’s general jurisdictional provisions in the Communications Act should not be construed as empowering the adoption of mandatory video description rules, because such an interpretation would render the specific, limited provisions in Section 713(f) entirely superfluous. *See, e.g., Hohn v. U.S.*, 118 S.Ct. 1969, 1976 (1998); *Kawaauhau v. Geiger*, 118 S.Ct. 974, 977 (1998) (stating reluctance to adopt a construction of a statute making another statutory provision superfluous).

authority with respect to video description is limited to conducting a study and reporting to Congress, and this limited authority cannot be expanded by reliance on other, very general statutory provisions that fail even to refer to video description.

E. Given the Constitutional Implications of Mandating Video Description Services, an Overly Broad Reading of the Commission’s Statutory Authority in this Area Must Be Avoided.

Beyond the reasons set forth above, the Commission’s authority with respect to video description should be interpreted strictly, due to the constitutional implications of requiring the production of described programming. As discussed below, mandating the creation of the second script necessary to provide video description raises the constitutional problem of forced speech. Because statutes are to be construed, if possible, so as to avoid constitutional difficulties, the Commission should not attempt to construe its limited authority in Section 713(f) to justify the adoption of mandatory video description rules.

The production of described video programming involves the creation of a second script that includes narrated descriptions of a program’s key visual elements. The insertion of this extensive narration in a video program necessarily alters the character of the original work and, in essence, results in the creation of a new and separate work. Moreover, unlike closed captioning which involves merely the transcription of the existing script of a program, video description involves artistic choices in developing the narration and creating a new script. NAB believes that the Commission’s proposed rules compelling the significant alteration of video programs, and the production of new creative works, raises constitutional concerns with forced speech.

The Supreme Court has explicitly held that the First Amendment is implicated when the government attempts to compel expression. As the Court has stated, the rights protected by the

First Amendment include “both the right to speak freely and the right to refrain from speaking at all.” *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).¹⁷ This First Amendment right to decide “what to say and what not to say” encompasses many types of speakers and subject matter.¹⁸

Given this broad First Amendment protection against compelled expression, the Commission’s proposed rules, which would compel the creation of entire scripts for video programming, raises clear constitutional concerns. Indeed, the Supreme Court has found unconstitutional a governmental attempt to compel the addition of the author’s name to anonymous campaign literature, because “an author’s decision to remain anonymous, like other decisions concerning omissions or additions to the content of a publication” was “an aspect of the freedom of speech protected by the First Amendment.” *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 342 (1995). If forcing only the addition of a name to a publication violates the First Amendment, then the Commission must recognize that compelling the significant alteration of a video program by the addition of an entire narration raises obvious constitutional questions.¹⁹ In this regard, the Commission should also realize that its video description proposal will impact the First Amendment rights of program producers and members

¹⁷ See also *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796-97 (1988) (the freedom of speech guaranteed by the First Amendment “necessarily” comprises “the decision of both what to say and what *not* to say”); *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995) (“one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say”).

¹⁸ See, e.g., *Pacific Gas and Elec. Co. v. Public Utilities Commission of California*, 475 U.S. 1, 16 (1986) (“the choice to speak includes within it the choice of what not to say” for both corporations and individuals); *Hurley*, 515 U.S. at 573 (general rule that “the speaker has the right to tailor the speech, applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact”); *Riley*, 487 U.S. at 797-98 (compelling either statements of opinion or statements of fact “burdens protected speech”).

¹⁹ See also *Pacific Gas*, 475 U.S. at 16 (finding First Amendment problems with a corporation being “required to alter its own message as a consequence of the government’s coercive action”).

of the creative community -- entities and individuals who are not even directly subject to the Commission's jurisdiction -- by requiring the significant alteration of their works.

Because mandating the provision of video description services has clear constitutional implications, the Commission should not attempt to expand its limited authority in Section 713(f) to justify the adoption of mandatory video description rules. As the Supreme Court has frequently instructed, the construing of statutes to raise serious constitutional problems should be avoided whenever possible.²⁰ Moreover, the Commission's interpretation of Section 713(f) as authorizing the adoption of mandatory video description requirements would not merit judicial deference because this construction does present serious questions of constitutional validity. *See Edward J. DeBartolo*, 485 U.S. at 574-77 (although National Labor Relations Board's construction of National Labor Relations Act would normally be entitled to deference under *Chevron*, the Board's interpretation of provision of Act was found not entitled to deference where such construction posed serious question of provision's validity under First Amendment).²¹

Thus, the Commission should construe Section 713(f) as authorizing only a study and report on video description, as such a reading is in accordance with its clear terms and would avoid the constitutional concerns associated with forced speech.²² Because the adoption of

²⁰ *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568, 575 (1988); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501 (1979).

²¹ *See also Blitz v. Donovan*, 740 F.2d 1241, 1244 (D.C. Cir. 1984) (Secretary of Labor's narrow reading of statutory provision was upheld because, in accordance "with a cardinal principle of statutory interpretation," it "avoided penalizing constitutionally protected conduct").

²² Even if Section 713(f) did not so clearly limit the Commission's authority, the constitutional difficulties raised by mandatory video description requirements should persuade the Commission to refrain from adopting such requirements.

mandatory video description rules would not only exceed the Commission's statutory authority but also implicate First Amendment questions, NAB believes that the Commission must refrain from imposing its proposed rules.

II. SOUND POLICY REASONS ALSO MILITATE AGAINST THE ADOPTION OF MANDATORY VIDEO DESCRIPTION RULES, PARTICULARLY IN THE ANALOG ENVIRONMENT.

A. The Commission Has Underestimated the Technical Difficulties and the Costs Associated with Providing Described Programming in the Analog Environment.

As explained in the *Notice* (at ¶ 10), "closed" video description is provided on the Secondary Audio Programming ("SAP") channel, which allows for an additional audio soundtrack for a video program. To accommodate this additional soundtrack, the *Notice* states that broadcast stations (as well as cable operators) must have the technical facilities to "pass through" the SAP channel information. The *Notice* (at ¶ 11) implies that the provision of described programming on the SAP channel will not be difficult technically because many stations are already SAP equipped, and, for those that are not, the cost to update equipment will be between \$5,000 and \$25,000. The Commission additionally implies that the four largest commercial television networks must be already equipped to provide video description on the SAP channel because they have all offered Spanish audio on the SAP channel. *See Notice* at ¶ 11.

The Commission has in fact severely underestimated the technical effort – and thus the cost – to implement its proposals requiring network affiliates in major markets to provide described programming on the SAP channel. The Commission's error may in part arise from its confusion over use of the term "SAP." While the *Notice* uses the term to refer generally to an additional audio sound track for a video program, "SAP" actually only applies to the signal broadcast from a television transmitter (or cable headend). "SAP" is in fact a term of art

referring to a specific component of the BTSC Multichannel Television Sound (“MTS”) System.²³ Thus, when the *Notice* (at ¶ 11) discusses the number of broadcast stations that are “SAP capable” or “SAP equipped,” this information only reveals the number of stations that can deliver an additional audio program from their transmitter facilities to the television receivers of consumers. The mere fact that a number of stations’ transmitter facilities are capable of producing a SAP channel does not begin to address the technical difficulties associated with the provision of described programming by network affiliates.

It is certainly not made clear in the *Notice* that implementing video description will actually require broadcasters to manage and distribute three channels of audio because the *main* audio in most television programs already includes two channels.²⁴ Thus, to provide a *secondary* audio program carrying video description will require a third audio channel. To fully appreciate the challenges of managing the three channels of audio required to provide video description, the Commission must consider the technical capabilities of the entire network program distribution and transmission chain. This chain includes the broadcast origination centers of the television networks and the networks’ distribution facilities (typically satellite systems), as well as the affiliated stations’ local television studios and local television transmitter facilities (which

²³ The MTS system is documented in OST bulletin No. 60, *Multichannel Television Sound Transmission and Audio Processing Requirements for the BTSC System*, April 1984, and in EIA TV Systems Bulletin #5, *Multichannel Television Sound BTSC System Recommended Practices*, July 1985. These documents describe how to implement television stereo in both receivers and transmitters. The MTS system provides for the transmission of a stereophonic (left and right) main audio program, a monophonic second audio program channel, and a narrow bandwidth, monophonic professional channel that is not intended to be received by consumers. *See also* 47 C.F.R. § 74.682(c)(3) (1998).

²⁴ Television programs are commonly produced with and furnished to network affiliates with two channels of main program audio. If the television program is in stereo, then the two audio channels furnished are stereo left channel and stereo right channel. When programs are

generate the SAP channel).²⁵ As discussed in detail below, adapting all these systems of the networks and their affiliates to carry three full channels of audio presents technical challenges that will entail significant financial outlays to overcome.

1. The Origination Centers and Distribution Systems of the Networks Were Generally Not Designed to Support Three Channels of Audio.

The broadcast origination centers of most major commercial networks have been designed and engineered to support only two channels of audio with each associated video program. The video and two channel audio infrastructure at these facilities allows the networks to provide national and regional feeds (as well as time zone shifted feeds) seamlessly, as part of normal network operations. On the occasions when these networks have offered Spanish language translations of the main program audio, engineers at the network centers have created a dedicated path – separate from the main program audio – often by temporarily “patching” it through manually to the networks’ satellite uplink facilities. However, to support a third audio channel on a consistent basis, as part of the networks’ routine operations – as would be necessary to provide several hours of described programming every week – the networks would have to re-engineer significant parts of their broadcast origination facilities. This task would require the installation of cabling and equipment to allow the additional level of audio to be routed through the broadcast origination centers, along with the video program, in the same manner as the

produced in mono, two channels are also furnished – mono on the left channel and mono on the right channel.

²⁵ It is only this last link in the chain – the capability of local affiliates’ transmitter facilities to generate the SAP channel – that the Commission has apparently addressed in the *Notice*. NAB agrees with the Commission that the majority of television stations in the top 25 markets can produce a SAP channel. *See Appendix, 2000 SAP Channel Survey* at 5 (81% of stations in top 10 markets and 88% of stations in markets 11-25 are equipped to broadcast in BTSC stereo). However, this bare fact certainly does not imply that the networks and their affiliates are currently capable of distributing described video programming.

current two channels of program audio. One major network estimates the cost of modifying its origination facilities in this manner at \$1.2 million.

The satellite distribution systems of the commercial networks consist of three major components – the network uplink system, the channels on the satellite (known as transponders), and the local affiliates' receive earth station systems. The satellite distribution system of at least one major network is currently incapable of delivering more than two channels of audio. As a result, this network can deliver a Spanish language or other additional audio track for a program to its affiliates only by uplinking this third audio track on an additional satellite transponder. Spanish audio, on the limited occasions when offered by this television network, is therefore treated as a totally separate path, distinct from the one used to distribute the main audio and video program. However, for this network to deliver a third audio track (such as for video description) on a routine, rather than on a very limited and occasional, basis would require extensive technical upgrades. For this one network alone, the cost of modifying its network origination center, and of upgrading its satellite system to uplink a third audio channel together with the video and main program audio, is estimated to be \$1.6 million.

Local affiliates seeking to receive a Spanish or other third audio track from this network typically use two separate satellite receive earth station packages. One points to the satellite transponder carrying the Spanish language channel. That audio is then combined with the two channels of English audio furnished by the affiliate's main earth station system and is routed through the local television plant. Because not all television stations have an additional earth station to dedicate just for this purpose, only a small number of affiliates of this network nationwide are capable of downlinking a Spanish or other third audio channel. Thus, to accommodate an additional channel of audio, the satellite downlink systems of many local

affiliates will have to be modified as well. This network estimates that it will cost \$800,000 to upgrade the local satellite receive systems of their affiliated stations to accommodate three channels of audio.²⁶

2. The Studio and Plant of Local Television Stations Were Generally Not Designed to Support More Than Two Channels of Audio.

Once a local affiliate receives the third audio track from a network, this track must be routed through the broadcast studio plant and sent to the station's transmitter (typically via an STL²⁷), where it is broadcast on the SAP channel. While it is true that many television stations' transmitter facilities are SAP-equipped,²⁸ it is also true that many local television studios have been designed and engineered to support only two channels of audio on a routine basis. Likewise, many STLs currently installed can only pass two channels of audio. Both of these systems must be upgraded to pass a third channel of audio on a regular basis. Thus, a number of local broadcasters will face technical challenges in managing three channels of audio similar to those experienced by the major networks, although on a smaller scale. In fact, one network estimates that it will cost \$400,000 to upgrade its owned and operated stations to support the three channels of audio needed to provide video description.²⁹

²⁶ This amount would be in addition to the estimated \$1.6 million this network would have to spend to modify its satellite system and network origination center, as previously described.

²⁷ An STL, or Studio-Transmitter-Link, is typically a fixed point-to-point microwave link authorized under Part 74, Subpart F of the Commission's Rules.

²⁸ That is, they have BTSC/MTS stereo generators installed.

²⁹ This amount would be in addition to the approximate \$1.2 million this network would need to spend to upgrade its network origination center, as previously described.

The Commission should realize that most local stations installed MTS equipment at their transmitters so they could broadcast the stereo programming supplied by their networks. Similarly, these stations constructed television studios and STLs that can pass the two channels of audio through to their transmitters. Until recently there has been little need to engineer the audio infrastructure in local television studios to support more than two audio channels on a consistent basis. As a result, many local stations will need to expend considerable effort to modify their analog television plants so as to accommodate described programming received regularly from the networks.³⁰ NAB believes that the \$5,000-\$25,000 figure cited by the Commission in the *Notice* (at ¶ 11) represents only a fraction of the total cost required to routinely support a third channel of audio at many local stations. The actual costs could far exceed the Commission's estimate, depending on the age and design of individual television studios.

Contrary to the implications in the *Notice* that the technical difficulties and costs associated with video description are minimal, the networks and their local affiliates would in fact be required to undertake extensive and expensive engineering modifications and upgrades to implement the Commission's proposals. The above-described technical upgrades to the networks' origination centers and distribution systems will be necessary because the Commission has proposed to require network affiliates to provide described prime time (or children's) programming, which, as a practical matter, will be *network* programming. Thus, the fact that a number of individual stations are SAP equipped (*i.e.*, have transmitters capable of generating a SAP channel) does not mean that the networks are capable of originating and

³⁰ Local stations that currently broadcast a Spanish language track for certain local programming on their SAP channels will often employ creative, *ad hoc* solutions for routing a third channel of audio.

distributing via satellite, and affiliated stations capable of receiving and routing, described prime time programming on a consistent basis. NAB also notes that these costs for networks and affiliates are magnitudes of order greater than the hardware costs associated with implementing closed captioning of video programming.

Moreover, NAB wants to emphasize that the networks and their affiliates would have to incur the significant costs described above just to provide *analog* video description. The extensive technical upgrades that must be made to the networks' and local affiliates' existing analog systems to distribute described programming cannot continue to be utilized after the transition to a digital transmission system. In light of the current transition to digital television ("DTV"), NAB questions the utility of requiring these extensive modifications to the analog systems of the broadcast networks and their affiliates. Indeed, NAB asserts that forcing broadcasters to spend substantial monies on their soon-to-be obsolete analog systems constitutes an undue burden. NAB also reminds the Commission that the more resources required to be expended on analog broadcasting, the fewer resources will be available for the implementation of DTV. For all these reasons, the Commission should reconsider its proposal to mandate the provision of described video programming by major market network affiliates in the analog environment.

B. To the Extent that "Closed" Video Description Requirements Are Adopted, Other Important Uses of the SAP Channel Will Be Foreclosed in an Analog Environment.

The *Notice* (at ¶ 19) proposed to adopt "rules to phase 'closed' video description into the marketplace," starting with network-affiliated television stations in the top 25 Designated Market Areas ("DMAs"). As discussed above, closed description is provided on the SAP channel, which allows for an additional audio soundtrack for a program. However, a number of broadcast

stations currently use the SAP channel to provide other services (particularly foreign language audio) to viewers. The *Notice* (at ¶ 30) sought comment on how “potential conflicts” between these competing uses of the SAP channel “could be avoided or minimized” and “whether there are any technical solutions to such potential conflicts in the analog environment.”

In the analog environment, NAB is aware of no “technical solutions” that would allow the SAP channel to be used to provide both video description and another service (such as foreign language audio) for the same programming.³¹ Thus, to the extent that video description requirements are adopted, then other uses of the SAP channel will be foreclosed in an analog environment. Particularly since the Commission expects “to increase the amount of required described programming over time” (*Notice* at ¶ 21), broadcasters may ultimately be precluded from providing other important services to their viewers.

As shown in NAB’s attached survey of commercial television stations, 24% of all responding television stations currently broadcast on their SAP channels. However, with regard to the stations in the top 25 DMAs at issue in this proceeding, a much higher percentage utilize their SAP channels; specifically, 45% of the responding television stations in the top ten markets and 35% of the stations in markets 11-25 currently broadcast on their SAP channels.³² In

³¹ The SAP channel is a single channel that allows for the carriage of one additional audio soundtrack for a program. This additional audio soundtrack can be either video description or some other service, such as a foreign language.

³² It should be noted that not all television stations responding to NAB’s survey are even capable of utilizing SAP channels because they are not equipped to broadcast in BTSC stereo. Among those stations in the largest markets that are so equipped, 55% of the top ten market stations currently broadcast on their SAP channels while 40% of the stations in markets 11-25 broadcast on their SAP channels.

addition, NAB's survey revealed that these stations use their SAP channels primarily for Spanish language programming.³³ See Appendix, *2000 SAP Channel Survey* at 6-7.

NAB's survey shows that a significant number of television stations in the top 25 markets currently use their SAP channels to provide viewers with other services, especially foreign language audio. NAB suggests that viewers in the analog environment may be better served if licensees retain the discretion to determine which type of services – whether foreign language, video description or other – should be offered to local viewers on the SAP channel.³⁴ Rather than the government determining that one particular use of the SAP channel is superior to all others and imposing mandatory video description requirements that foreclose other uses, the Commission may well be advised to focus now on insuring that the digital equipment currently being developed will fully accommodate video description.

C. Given the Limitations of Analog Technology and the Current Transition to Digital Broadcasting, the Commission Should Focus on Encouraging the Production of DTV Equipment that Fully Supports Video Description.

As described above, requirements mandating the provision of video description in the analog environment would impose significant technical and financial burdens on networks and local affiliates and could foreclose other uses of the SAP channel by broadcast stations. Given the difficulties inherent in implementing video description in an analog environment, NAB believes the Commission should instead focus on the current transition to digital broadcasting so as to insure that video description can be implemented in the digital environment. This approach

³³ Other uses of the SAP channel include weather updates and promotional feeds to radio stations. A number of stations also carry another feed of their main audio channel on the SAP channel to avoid consumer confusion if the SAP channel is inadvertently selected.

³⁴ Especially in those top 25 markets with significant Spanish speaking populations (such as New York, Los Angeles, Washington, D.C., Dallas, Houston, Phoenix and Miami), offering Spanish language audio on the SAP channel clearly serves the public interest.

would, as previously discussed, also avoid requiring broadcasters to rebuild their analog distribution systems at a time when they are scheduled to be abandoned. The Commission should not mandate such “orphan” investments.

The Commission simply seems to assume in the *Notice* that the provision of described video programming in the digital environment will present no real challenges.³⁵ NAB believes that such optimism may be unfounded, given the uncertainty that exists with regard to the ability of DTV receivers to fully support video description.

The ATSC DTV standard does in fact provide for the capability to send multiple program audio channels with a video program.³⁶ However, while the DTV standard does describe how to implement multiple audio services, it remains unclear whether DTV receivers are required to decode services other than the primary audio channel. But even assuming that the DTV standard does require receivers to decode more than one audio track, it is not clear how many more audio tracks DTV receivers are required to decode. Moreover, the DTV standard remains silent on whether digital receivers are required to provide consumers with an on-screen method for choosing between the available audio tracks (which may include various other languages and/or video description). And most importantly, it is unknown whether the DTV receivers currently being manufactured can decode and play more than the main program audio service.

Simply put, there is no assurance that, even though the ATSC DTV system provides for multiple audio services, DTV receiver manufacturers will actually implement this feature so that all digital televisions fully support multiple audio channels. Given this uncertainty, the

³⁵ For example, Paragraph 22 of the *Notice* states that the “flexibility inherent in digital technology may make the provision of video description even easier and less costly.”

Commission should focus its efforts with regard to video description on insuring that DTV receivers will be able to support video description, now and in the future. Indeed, we believe that this is yet another reason why the Commission should establish DTV receiver specifications.³⁷ If the Commission did act to establish such receiver specifications, then it could insure that the ability to support video description services would be included in those standards.

D. Mandating the Provision of Described Programming Raises Additional Legal and Practical Complexities, Even in the Digital Environment.

In addition to the technical difficulties associated with providing described programming in the analog environment, mandating the provision of video description – whether in an analog or digital environment – presents other legal and practical complexities. In particular, NAB believes that the Commission has underestimated the extent to which mandated video description requirements will raise copyright questions and necessitate significant changes to the entire network program production process.

Unlike closed captioning, which involves only the transcription of an existing video program, providing a description of the video portion of a television program requires the creation of a separate script. It seems clear that such separate scripts constitute “derivative works” under U.S. copyright law and are separately copyrightable.³⁸ In addition, the

³⁶ See ATSC Document A/52, *Digital Audio Compression (AC-3) Standard*, Dec. 20, 1995 and ATSC Document A/53, *ATSC Digital Television Standard*, Sept. 16, 1995. Published by the Advanced Television Systems Committee, available at www.atsc.org.

³⁷ NAB has previously argued that the Commission should act to define receiver standards, as part of an effort to encourage the overall DTV transition. See, e.g., Comments of NAB in CS Docket No. 98-120 at Appendix G (filed Oct. 13, 1998).

³⁸ A derivative work is one “based upon one or more preexisting works such as a translation . . . abridgement, condensation, or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an original work of authorship, is a ‘derivative work.’” 17 U.S.C. § 101. See also 1 M.B. Nimmer and D. Nimmer, *Nimmer on Copyright* §

unauthorized incorporation of a pre-existing work (such as a video program's original script) into a derivative work (such as a video described script) constitutes an act of copyright infringement (assuming, of course, that the pre-existing script is protected by copyright).³⁹ Given these copyright protections involved in the creation of the separate scripts needed for video description, complying with a mandate to provide described programming will require the obtaining of additional authorizations from the creators of the pre-existing scripts and the revising of existing contractual obligations with the creative community.

Because video description requires the creation of a separate script, the recording of a narration, and the mixing of the main soundtrack with the descriptive narrative, video description is more costly and time-consuming than closed captioning. Indeed, given the more complex nature of video description, compliance with the Commission's proposal to require the provision of described programming will necessitate alterations in the entire program production process. The broadcast networks typically receive programs (such as their prime time series) from the producers a very short time before air. If the networks had to arrange for the programs to be described after receiving them, then the production process would have to be altered to guarantee the receipt of the programs well in advance of air. The networks could instead arrange for their programming to be described during the production process and prior to their receipt of the programming. This would entail an additional step in the existing production process and would increase the time needed to produce programs before delivery to the networks. In either case, the

3.01 (1999) (any work based in whole, or in substantial part, on a preexisting work, if it satisfies certain originality requirements and is not itself an infringing work, will be separately copyrightable).

³⁹ *Nimmer on Copyright*, § 3.06.

networks' existing schedule for the production of programming would need to be lengthened, and the existing production system altered to include the process of describing programming.

Beyond adding to the length of the program production process, video description will, of course, also add to the cost of programming. Although video description is more expensive than closed captioning, the exact costs remain unclear.⁴⁰ The *Notice* (at ¶ 15) cites information provided by public broadcaster WGBH that the expense of describing programming is approximately \$3,400 per hour. NAB believes that this figure will not necessarily be the same for the commercial networks, however. WGBH's Descriptive Video Service has an in-house staff that performs all functions necessary to describe programming, while the networks will need to consider these issues in conjunction with others relating to the creative community and the general program production process. Experience with other aspects of the creative process indicates that program producers and directors are likely to insist on the right to create and control descriptions of their programs themselves. If that proves true, the WGBH experience may have little predictive value.

Because a mandate to provide video description will require significant changes to the current television program production system, the implementation of any video description requirements will need to be timed carefully. If the Commission chooses to adopt mandatory video description rules at this time or in the future, NAB believes that the implementation of those requirements should coincide with the start of a television "season." Specifically, any requirement to provide described programming should coincide with the start of the next

⁴⁰ *See Report* in MM Docket No. 95-176, 11 FCC Rcd 19214, 19258 (1996) (noting varying estimates of the cost of providing video description and the "labor intensive" nature of the service).

television season following 18 months after the effective date of the Commission's rules.⁴¹ Such an implementation schedule would better account for the changes that would have to be made in the program production system so as to comply with any video description requirements.

E. The Commission Has Not Yet Realistically Assessed the Costs and Benefits of its Proposed Video Description Requirements.

In directing the Commission to adopt regulations to "ensure" the accessibility of video programming through closed captioning, Congress also specifically authorized the Commission to exempt programs and services, as well as programming providers, from the captioning requirements, if complying with those requirements would be economically burdensome. *See* 47 U.S.C. §§ 613(d)-(e). NAB believes that the Commission should include comparable exemptions and waivers in any video description rules. *See Notice* at ¶ 33. Indeed, consistent with the closed captioning rules, the Commission should completely exempt certain categories of programming from any description requirements because certain program types (*e.g.*, news, sports and other live programs) are inherently unsuited to video description. Beyond considering such exemptions, however, the Commission must also weigh the relative costs and benefits involved before even adopting regulations pertaining to video description, whether in an analog or digital environment.

As described in detail above, the costs associated with providing described programming (including both program production and technical upgrades) may be greater than the

⁴¹ Commercial television networks premiere their new programs starting in the fall of each year. To have a definite date for the implementation of any video description rules, a television season should be regarded as starting on the first of October. Thus, NAB recommends that implementation of any rules should commence on the October 1st following 18 months after the effective date of the rules. The first of October is also the beginning of a calendar quarter, which would be a convenient date to implement rules based on the provision of a certain amount of described programming per calendar quarter, as the Commission has proposed.

Commission anticipated, especially in the analog environment.⁴² Given the substantial costs involved, the Commission should carefully consider whether the benefits to be gained from adopting mandatory video description requirements are sufficient to justify imposing those requirements. To conduct this analysis, the Commission must first obtain relevant and accurate information about the population to be benefited from video description and the degree to which this population will in fact benefit. Some evidence suggests that the *Notice* overestimated both the audience that would benefit from video description and the degree to which they would benefit.⁴³ No realistic determination of the relative costs and benefits of video description requirements (whether in an analog or digital environment) can be made until the Commission has directly addressed issues such as these. NAB submits that, until the Commission has conducted a thorough analysis of the costs and benefits of its proposal, the Commission must refrain from adopting mandatory video description rules.⁴⁴

⁴² Any analysis of the costs must include consideration of the opportunity costs of mandating video description. These opportunity costs would include any foreclosure of the SAP channel from other uses, and the funding diverted from the conversion to digital television to upgrading analog equipment that will only be used for a few more years.

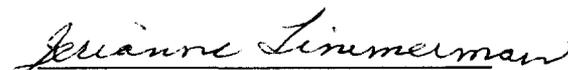
⁴³ For example, the *Notice* stated that the primary audience for video description consists of the 8-12 million persons with visual disabilities. One study, however, has estimated the visually impaired population to be approximately 6.5 million persons, or less than 3% of the U.S. population. This study also noted that this population watched television and videotapes in similar numbers and with similar frequency to the general population. See J. Packer and C. Kirchner, *Who's Watching? A Profile of the Blind and Visually Impaired Audience for Television and Video*, 5, 9 (1997). Thus, this study suggests that visually impaired viewers do not find television inaccessible even without mandated video description, and that video description would only enhance the television viewing experience, rather than transform a formerly inaccessible medium to one that is totally accessible. NAB also notes the speculative nature of the Commission's depiction of the secondary audience for video description. See *Notice* at ¶¶ 7-8.

⁴⁴ The Commission should also conduct a similar analysis of the proposal to require broadcasters to provide aural tones to accompany public safety messages that scroll across television screens. See *Notice* at ¶ 32. Specifically, does any evidence exist to show that current emergency information is inadequate, or that visually impaired persons have been unable to obtain adequate

III. CONCLUSION

As described in detail above, the Commission lacks statutory authority to prescribe rules requiring the provision of video description services. NAB also believes that the Commission's proposal to mandate the provision of described programming raises the constitutional problem of forced speech. Beyond these statutory and constitutional difficulties with mandatory video description rules, NAB has shown that the Commission's proposal should not be adopted for a number of other technical, legal and practical problems associated with providing described programming, especially in the analog environment. Given the limitations of analog technology and the current transition to digital broadcasting, NAB believes that the Commission should decline to adopt its proposed rules. Instead, the Commission should consider ways to promote the provision of video description services in the digital environment, such as by insuring that DTV receivers fully support multiple audio channels.

**NATIONAL ASSOCIATION OF
BROADCASTERS**
1771 N Street, NW
Washington, DC 20036
(202) 429-5430


Henry L. Baumann
Jack N. Goodman
Jerianne Timmerman

Arthur W. Allison III
Kelly T. Williams
NAB Science and Technology

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emergency information from other sources? Does the Commission know how many television stations may already provide these aural tones? Would the imposition of a mandatory requirement regarding aural tones tend to discourage broadcasters from providing additional emergency information, beyond that which is mandated? Questions such as these should be answered before the Commission adopts this proposal.